

Nos. 76-529, 76-585, 76-594, 76-603, 76-619, 76-620

Supreme Court, U. S.

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AUG 26 1977

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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**MONTANA POWER COMPANY, ET AL., PETITIONERS**

*v.*

**UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.**

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**AMERICAN PETROLEUM INSTITUTE, ET AL., PETITIONERS**

*v.*

**UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.\***

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**ON WRITS OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**MOTION TO DISMISS THE WRITS OF CERTIORARI  
AS IMPROVIDENTLY GRANTED OR  
TO VACATE AND REMAND**

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\* Additional captions appear on reverse side.

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INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,  
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

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ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

---

UTAH POWER AND LIGHT COMPANY, ET AL.,  
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

---

WESTERN ENERGY SUPPLY AND TRANSMISSION  
ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

**In the Supreme Court of the United States**

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No. 76-529

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*v.*

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No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., PETITIONERS

*v.*

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

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No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,  
PETITIONERS

*v.*

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

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No. 76-603

ALABAMA POWER COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.

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No. 76-619

UTAH POWER AND LIGHT COMPANY, ET AL.,  
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION  
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WESTERN ENERGY SUPPLY AND TRANSMISSION  
ASSOCIATES, ET AL., PETITIONERS

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ON WRITS OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO DISMISS THE WRITS OF CERTIORARI  
AS IMPROVIDENTLY GRANTED OR  
TO VACATE AND REMAND

The federal respondents move that the writs of certiorari in these cases be dismissed on the ground that subsequently enacted legislation has rendered the

granting of the writs improvident or, in the alternative, that the judgment be vacated and the case remanded for further consideration in light of the new legislation.

In these cases the court of appeals held that regulations of the Environmental Protection Agency "designed to prevent 'significant deterioration' of air quality in those areas which have air that already is cleaner than the national ambient air quality standards" (A. 43a) are authorized by the Clean Air Act, 42 U.S.C. 1857 *et seq.* (A. 43a-90a).<sup>1</sup> The regulations

<sup>1</sup> The details of the regulations (40 C.F.R. 52.01(d) and (f), and 52.21) (A. 206a, 242a-291a), the history of the proceedings and the basis for the court of appeals' ruling are summarized in the Memorandum for the Federal Respondents addressing the several petitions for a writ of certiorari.

The court of appeals reaffirmed an earlier ruling that the Environmental Protection Agency was required to promulgate such regulations. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), affirmed (C.A.D.C.) (*per curiam*) (Pet. No. 76-529, App. A, p. 9a), affirmed by an equally divided court *sub nom. Fri v. Sierra Club*, 412 U.S. 541.

As to the validity of the particular regulations, the industry petitioners argued in the court of appeals that EPA had exceeded its statutory authority and abused its discretion because the regulations allegedly were unrelated to the effects of adverse air quality, were unworkable and interfered with authority granted to the states under the Act. The court rejected these arguments and rejected as well petitioners' further contentions that the regulations were unconstitutional because they had no rational relationship to the protection of public health, took private property without just compensation and represented an unconstitutionally vague delegation of authority to EPA (Pet. App. A, pp. 34a-44a, 48a-50a). The court further held that the question regarding the authority of Federal Land Managers and Indian governing bodies to

define areas where air quality is better than national air quality standards as Class I, Class II, and Class III, allowing, respectively, the least, more and most deterioration in relation to the national standards. They also provide a procedure for redesignation of the appropriate class by the states, federal land managers and Indian tribes.

At the time of the decision, the Act contained no detailed provisions concerning prevention of significant deterioration. The court of appeals found authority for the regulations to be implied by the language, purpose and legislative history of the Act, especially the 1967 amendment, 81 Stat. 485, and subsequent statements of legislative purpose in the Congress.

On April 4, 1977, this Court granted the petitions for writs of certiorari in these cases limited to the following questions (A. 292a):

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act.
2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regu-

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redesignate their lands was not ripe for review (Pet. App. A, pp. 45a-48a). As to the contentions of the petitioners representing environmental groups and individuals, the court held that the regulations were not invalid on the basis that air quality in regions designated class III would deteriorate or on the basis that only two of the six primary air pollutants are covered (Pet. App. A, pp. 29a-34a).

lations which grant to federal land managers and Indian governing bodies power to re-classify federal and Indian lands within their jurisdiction.

On August 7, 1977, the President approved the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685. Among other things, the 1977 Amendments include in the Clean Air Act for the first time detailed provisions concerning the prevention of significant deterioration of air quality. Section 127(a) of Pub. L. 95-95 (App., *infra*, pp. 1a-25a).

The following provisions of the Amendments ratify the existing regulations by reference and thus eliminate the controversy presented by the first question: (1) New Section 162(a) provides that "All areas which were redesignated as class I under regulations promulgated before [the effective date of the 1977 Amendments] shall be class I areas which may be redesignated" under the provisions of the Amendments (App., *infra*, p. 3a). (2) New Section 168(a) provides that until implementation plans for the prevention of significant deterioration under the Amendments become effective, "applicable regulations under this Act prior to enactment of this part shall remain in effect," except that if such regulations would be inconsistent with specified sections of the new statute, the regulations shall be deemed amended to conform with the requirements of those sections. (3) In addition, Section 168(b) provides that, for facilities on which construction began after June 1, 1975, but prior to the 1977 Amendments, "the review and per-

mitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to the enactment of" the 1977 Amendments. (App., *infra*, pp. 21a-22a).

As to the second question, the regulations relating to the authority of Indian governing bodies are confirmed by new Section 164(c), expressly conferring such authority (App., *infra*, p. 9a). With respect to the regulations authorizing federal land managers to redesignate, however, new Section 164(d) (App., *infra*, pp. 9a-10a) confers only powers of recommendation; no power to redesignate is granted. Thus the regulations as to federal land managers will have to be withdrawn.

In light of these legislative developments, we submit that the questions upon which this Court granted certiorari are no longer appropriate for its consideration. The law under which the Environmental Protection Agency's powers were to be tested has been significantly amended. There remains no controversy as to the authority of the Environmental Protection Agency to adopt, under the Clean Air Act, regulations for the prevention of significant deterioration in air quality, and providing for classification of air quality within Indian reservations by Indian governing bodies. On the other hand, Congress has now determined that federal land managers are to have different powers and the Agency accordingly must revise its regulations to conform with the statute.

In these circumstances, two possible dispositions should be considered. The court could simply dismiss the writs on the ground that the subsequent legislation has rendered the grants improvident. Cf. *Cook v. Hudson*, 429 U.S. 165; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70. Or the court could vacate the judgment of the court of appeals and remand the cases for further consideration of the questions on which certiorari was granted in light of the 1977 Amendments. Cf. *Environmental Protection Agency v. Brown*, Nos. 75-909, 75-960, 75-1050 and 75-1055, decided May 2, 1977; *Philadelphia v. New Jersey*, No. 75-1150, decided February 23, 1977, *Difenderfer v. Central Baptist Church*, 404 U.S. 412.

We believe that little purpose would be served by the latter course. This Court granted certiorari on only two questions, thus leaving the court of appeals' rejection of petitioners' other challenges to the regulations (see note 1, *supra*, pp. 3-4) undisturbed. While the controversy as to the issues on which certiorari was granted has been effectively mooted by the new legislation, the regulations themselves, as sustained by the court of appeals, remain in effect except to the extent superseded by the 1977 Amendments. The questions on which certiorari was granted, therefore, are no longer "special and important" (Rule 19 of this Court's Rules; see *Rice v. Sioux City Memorial Park Cemetery*, *supra*, 349 U.S. at 73-74), for they have no prospective significance and cannot arise again. Accordingly, dismissal of the writs as improvi-

dently granted is the appropriate disposition of these cases.

Respectfully submitted.

WADE H. MCCREE, JR.,  
*Solicitor General.*

MICHAEL A. JAMES,  
*Acting General Counsel,  
Environmental Protection Agency.*

AUGUST 1977.

## APPENDIX

### PREVENTION OF SIGNIFICANT DETERIORATION

SEC. 127. (a) Title I of the Clean Air Act is amended by adding the following new part at the end thereof:

#### "PART C—PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY

##### "SUBPART I

##### "PURPOSES

"SEC. 160. The purposes of this part are as follows:

"(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all national ambient air quality standards;

"(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

"(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

"(4) to assure that emissions from any source in any State will not interfere with any portion

of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

“(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

#### “PLAN REQUIREMENTS

“SEC. 161. In accordance with the policy of section 101(b)(1), each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) identified pursuant to section 107(d)(1)(D) or (E).

#### “INITIAL CLASSIFICATIONS

“SEC. 162. (a) Upon the enactment of this part, all—

“(1) international parks,

“(2) national wilderness areas which exceed 5,000 acres in size,

“(3) national memorial parks which exceed 5,000 acres in size, and

“(4) national parks which exceed six thousand acres in size and which are in existence on the date of enactment of the Clean Air Act Amendments of 1977 shall be class I areas and

may not be redesignated. All areas which were redesignated as class I under regulations promulgated before such date of enactment shall be class I areas which may be redesignated as provided in this part.

“(b) All areas in such State identified pursuant to section 107(d)(1)(D) or (E) which are not established as class I under subsection (a) shall be class II areas unless redesignated under section 164.

#### “INCREMENTS AND CEILINGS

“SEC. 163. (a) In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under 165(d)(2)(C)(iv) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

“(b)(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

## 4a

"Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean .....	5
Twenty-four-hour maximum .....	10
Sulfur dioxide:	
Annual arithmetic mean .....	2
Twenty-four-hour maximum .....	5
Three-hour maximum .....	25

"(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

"Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean .....	19
Twenty-four-hour maximum .....	37
Sulfur dioxide:	
Annual arithmetic mean .....	20
Twenty-four-hour maximum .....	91
Three-hour maximum .....	512

"(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

"Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean .....	37
Twenty-four-hour maximum .....	75
Sulfur dioxide:	
Annual arithmetic mean .....	40
Twenty-four-hour maximum .....	182
Three-hour maximum .....	700

## 5a

"(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to—

"(A) the concentration permitted under the national secondary ambient air quality standard, or

"(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

"(c) (1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutants shall not be taken into account:

"(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.

“(B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan,

“(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

“(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 169(4).

“(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

“(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

#### “AREA REDESIGNATION

“SEC. 164. (a) Except as otherwise provided under subsection (c), a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:

“(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

“(2) a national park or national wilderness area established after the date of enactment of this Act which exceeds ten thousand acres in size.

Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 162(a)) may be redesignated by the State as class III of—

“(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;

“(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

“(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

“(b) (1) (A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and analysis of such effects shall be reviewed and examined by the redesignating authorities.

“(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subsection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this

section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

“(C) The Administrator shall promulgate regulations not later than six months after date of enactment of this part, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

“(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

“(c) Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e).

“(d) The Federal Land Manager shall review all national monuments, primitive areas, and national

preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within supporting analysis, to the Congress and the affected States within one year after enactment of this section. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

“(e) If any State affected by the redesignation of area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issue for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such

disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

#### “PRECONSTRUCTION REQUIREMENTS

“SEC. 165. (a) No major emitting facility on which construction is commenced after the date of the enactment of this part, may be constructed in any area to which this part applies unless—

“(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

“(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

“(3) the owner or operator of such facility demonstrates that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time

per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;

"(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this Act emitted from, or which results from, such facility;

"(5) the provisions of subsection (d) with respect to protection of class I areas have been complied with for such facility;

"(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

"(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

"(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 111 of this Act has been promulgated subsequent to enactment of the Clean Air Act Amendments of 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

"(b) The demonstration pertaining to maximum allowable increases required under subsection (a) (3)

shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on the date of enactment of the Clean Air Act Amendments of 1977, whose actual allowable emissions of air pollutants, after compliance with subsection (a) (4), will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides, will not contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

"(c) Any completed permit application under section 110 for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

"(d) (1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

"(2) (A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

"(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative re-

sponsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

“(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

“(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

“(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land

Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations, which exceed the maximum allowable increases for class I areas, the State may issue a permit.

“(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such sources together with all other sources, will not exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable increase (in micrograms per cubic meter)
“Particulate matter:	
Annual geometric mean .....	19
Twenty-four-hour maximum .....	37
Sulfur dioxide:	
Annual arithmetic mean .....	20
Twenty-four-hour maximum .....	91
Three-hour maximum .....	325

“(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide

for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

"(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

"(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such source, together with all other sources, will exceed the otherwise applicable maximum allow-

able increases for a period of exposure of twenty-four hours or less on not more than eighteen days during any annual period and that during such day such emissions will not exceed the following maximum allowable increases over the baseline concentration for such pollutant:

**MAXIMUM ALLOWABLE INCREASE**  
[In micrograms per cubic meter]

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum .....	36	62
3-hr maximum .....	130	221

"(e)(1) The review provided for in subsection (a) shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this Act which will be emitted from such facility.

"(2) Effective one year after date of enactment of this part, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall

be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

"(3) The Administrator shall within six months after the date of enactment of this part promulgate regulations respecting the analysis required under this subsection which regulations—

"(A) shall not require the use of any automatic or uniform buffer zone or zones,

"(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this Act which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

"(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

"(D) shall specify with reasonable particularity each air quality model or models to be

used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

#### "OTHER POLLUTANTS

"SEC. 166. (a) In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after the date of enactment of this part, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after the date of the enactment of this part, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

"(b) Regulations referred to in subsection (a) shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or promulgation in the same manner as required under section 110.

"(c) Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 101 and section 160.

"(d) The regulations of the Administrator under subsection (a) shall provide specific measures at least as effective as the increments established in section 163 to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

"(e) With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate matter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator's approval or promulgated by the Administrator under section 110(c) contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 160 at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.

#### "ENFORCEMENT

"SEC. 167. The Administrator shall, and a State may, take such measures, including issuance of an

order, or seeking injunctive relief, as necessary to prevent the construction of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area included in the list promulgated pursuant to paragraph (1)(D) or (E) of subsection (d) of section 107 of this Act and which is not subject to an implementation plan which meets the requirements of this part.

#### "PERIOD BEFORE PLAN APPROVAL

"SEC. 168. (a) Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this Act prior to enactment of this part shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b).

"(b) If any regulation in effect prior to enactment of this part to prevent significant deterioration of air quality would be inconsistent with the requirements of section 162(a), section 163(b) or section 164(a), then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced in accordance with this definition after June 1, 1975, and prior to the enactment of the Clean Air Act Amendments of 1977, the review and permitting

of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to the enactment of the Clean Air Act Amendments of 1977.

#### "DEFINITIONS

"SEC. 169. For purposes of this part—

"(1) The term 'major emitting facility' means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than two hundred and fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing

facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

"(2) (A) The term 'commenced' as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

"(B) The term 'necessary preconstruction approvals or permits' means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

"(3) The term 'best available control technology' means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy,

environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of 'best available control technology' result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 111 or 112 of this Act.

"(4) The term 'baseline concentration' means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part."

(b) Within one year from the date of enactment of this Act the Administrator shall report to the Congress

on the consequences of that portion of the definition of "major emitting facility" under the amendment made by subsection (a) which applies to facilities with the potential to emit two hundred and fifty tons per year or more. Such study shall examine the type of facilities covered, the air quality benefits of including such facilities, and the administrative aspect of regulating such facilities.

(c) Not later than one year after the date of enactment of this Act, the Administrator shall publish a guidance document to assist the States in carrying out their functions under part C of title I of the Clean Air Act (relating to prevention of significant deterioration of air quality) with respect to pollutants, other than sulfur oxides and particulates, for which national ambient air quality standards are promulgated. Such guidance document shall include recommended strategies for controlling photochemical oxidants on a regional or multistate basis for the purpose of implementing part C and section 110 of such Act.

(d) Not later than two years after the date of enactment of this Act, the Administrator shall complete a study and report to the Congress on the progress made in carrying out part C of title I of the Clean Air Act (relating to significant deterioration of air quality) and the problems associated with carrying out such section, including recommendations for legislative changes necessary to implement strategies for controlling photochemical oxidants on a regional or multistate basis.